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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning High-Speed	)	GEN Docket No. 00-185
Access to the Internet Over	)	
Cable and Other Facilities	)	

COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION

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December 1, 2000

No. of Copies rec'd 0+9
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The National Cable Television Association ("NCTA") hereby submits its comments in the above-captioned docket. NCTA is the principal trade association of the cable television industry in the United States, representing cable television operators serving over 90 percent of the Nation's cable television households. It also represents over 100 cable program networks, as well as equipment suppliers and providers of other services to the cable industry.

INTRODUCTION AND SUMMARY

The nation's communications policy makers have rightly focused on this proceeding to help guide the United States' broadband policy. The Commission has maintained a market approach to the development of broadband facilities, with "vigilant oversight," highlighted by three reviews of broadband development since early 1999. As these Comments demonstrate, the result of the Commission's approach has been an unparalleled emergence of facilities-based competitors, led by the cable industry, and price, service, and feature competition from this wide range of broadband providers. New enterprises, staking their claim on the availability of broadband, are emerging. And residential customers, the focus and beneficiaries of cable's broadband buildout, can avail themselves of the full power of the Internet in ways not possible even 24 months ago. A great and powerful new residential infrastructure has emerged thanks to

the Commission's policies. Little wonder that this proceeding has generated widespread interest from the many concerned with broadband's fate.

NCTA believes that it is wrong as a matter of law and unwise as a policy to have government compel access by multiple Internet Service Providers (ISPs) to the cable plant.

It is wrong as a matter of law to conclude that cable modem service is a common carrier service subject to the panoply of tariffing and forced access that advocates of such an approach would apply. For nearly a quarter century, Congress and this agency have sought to replace regulation with competition and have acted to decrease levels of regulation. This agency, which has been a model to other countries' efforts at regulatory reform, must not reverse course and jettison *all it has learned about the shortcomings of* heavy-handed regulation.

NCTA believes that cable modem service is best classified, for regulatory purposes, as a cable service, immune from regulation as a common carrier or utility; or at most it is an information service that has not historically been subject to such regulation. In any case, it is not a telecommunications service, because there is no offering of telecommunications for a fee directly to the public. Under well-established legal principles, there is no justification for extending common carrier regulation to cable modem service as an assertion of "ancillary jurisdiction" or on any other basis. Further, imposition of a forced access requirement, especially in the absence of a compelling government interest, raises serious First Amendment concerns.

As a matter of policy, the Commission's policy of vigilant monitoring and regulatory restraint has produced a fierce competitive battle among cable, telephone companies, wireless operators, and others to build broadband facilities and market those products in innovative ways. As the attached Broadband Intelligence, Inc. report details, digital subscriber line (DSL)

penetration grew at a rate faster even than cable for the first nine months of 2000. This result is all the more noteworthy because it was cable's leadership in first providing broadband to the home that spurred the telephone industry -- with ten times the capitalization of the cable industry -- to enter the playing field with its DSL services. And it was cable's demonstration of the viability of this residential market -- both urban and rural -- that is leading the DBS and fixed and mobile wireless industries to follow suit and compete.

This array of competition -- facilities-based competition -- counsels strongly against application of a common carrier regime for cable. What the Commission and Congress have so persistently sought as a precondition to deregulate elsewhere -- the presence of well-funded, facilities-based competitors -- has come to pass, and speedily, in broadband. The hallmarks of competition abound -- witness the frequent offers of DSL found in telephone company bill inserts, the Sunday newspaper ads for satellite broadband, and the on-the-street competition from wireless devices. In such a marketplace, it makes no sense to start regulating new entrants that lack market power.

The competitive environment also ensures that the aspirations of unaffiliated ISPs will be met. As the accompanying report from Charles River Associates observes, there are incentives for cable to accommodate ISPs who offer value to consumers, if for no other reason than that subscribers can and will go elsewhere to find them. Cable operators have strong marketplace incentives to give their customers access to the widest range of content and services available on the Internet. Cable operators have recently begun trials that will allow the industry to achieve technical solutions enabling multiple ISP access to the cable plant. And, as the Charles River report further notes, it is far too early in broadband's development to conclude that any provider

will be able to prevent a significant number of customers from switching to or joining up with a particular ISP.

Not only is forced access unwise from a legal and policy standpoint; it will thrust government into the minutiae of business arrangements even though there is no dominant incumbent supplier present. Establishing the terms and conditions for cable access is best left to independently-negotiated technical and commercial arrangements that reflect the unique needs and attributes of the parties. Dictating a particular technical solution would introduce unnecessary and counter-productive complications into a working marketplace. In this rapidly changing environment, one size emphatically does not fit all. Imposing forced access would lead quickly and inevitably to a complex set of regulations that would keep the Commission occupied on a full-time basis for years and would hinder *investment*, *competition*, and the creation and emergence of innovative business plans.

* * *

As the Commission considers the legal classification of cable modem service and other regulatory implications raised in the *Notice*, NCTA wishes to emphasize one further point. Cable is committed to insuring that its modem service customers have the ability to reach any content or service on the Internet. Cable modem service has been instrumental in bringing the first glimpses of a broadband information environment to the home. What ISDN did not do, what users of T-1 lines could not afford to do, cable modem service has done: provide a reasonably priced, reliable, broadband residential connection to the Internet.

More than that, cable launched a series of races around the nation from DSL, wireless, and satellite to sign up customers and develop offerings, races that are still in early heats. There is no telling what new service and product innovations will come from that competition. And the

Commission, through its *706 Reports*, will be monitoring this market carefully for some time to come, should these races veer from a competitive track. But now would be the wrong time for the regulators to impose new and inappropriate regulation on the cable industry. Let competition continue unfettered so that the promise of broadband can be fulfilled.

I. REGARDLESS OF WHETHER CABLE MODEM SERVICE IS A CABLE SERVICE, INFORMATION SERVICE, OR TELECOMMUNICATIONS SERVICE, FORCED ACCESS REQUIREMENTS ARE UNLAWFUL

The Commission has requested comment on whether to classify cable modem service as a cable service, information service, or telecommunications service.[1/] This is a question of potentially profound significance, since the answer could determine the regulatory treatment of this exciting new offering. NCTA believes that cable modem service is a cable service. The Telecommunications Act of 1996 ("1996 Act")'s amendments to the 1992 Cable Act reflect a recognition by Congress that cable services have evolved beyond the traditional provision of video programming. Whether or not cable modem service is a cable service, however, it is in any event an information service. Under either classification, a forced access requirement is unlawful.

Under no circumstances is cable modem service a telecommunications service. In providing cable modem service, cable operators do not offer telecommunications to the public for a fee. But even if cable modem service entailed the offering of transport to unaffiliated ISPs, forced access obligations would still be unlawful. A cable operator's only "interconnection" obligation in that case would be to allow interconnection with other ISPs "directly or indirectly," and cable operators already meet that requirement.

[1/] *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, FCC 00-355 (rel. Sept. 28, 2000) ("*Notice*") ¶ 15.

A. Cable Modem Service Is A Cable Service.

Since the enactment of Title VI in 1984, the definition of "cable service" has included not only "video programming," but also "other programming service,"[2/] which was and is defined broadly as "information that a cable operator makes available to all subscribers generally."[3/] Cable modem service easily falls within the definition of "other programming service": it combines online content with a connection to the Internet, affording subscribers access to "information" that is "available to all subscribers generally."[4/]

The 1996 Act expanded the definition of "cable service"[5/] to include "interactive services" like cable modem services.[6/] As the legislative history explains, this change reflects the evolution of cable services from the traditional one-way provision of video programming to include interactive services.[7/] The effect of this change is to prevent a cable operator offering

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[2/] 47 U.S.C. § 522(6).

[3/] *Id.* § 522(14).

[4/] *MediaOne Group, Inc. v. County of Henrico*, 97 F.Supp.2d 712, 715 (E.D.Va. 2000). The *Notice* asks what effect classifying cable modem service as a cable service would have on franchise fees and other local requirements. *Notice* ¶ 17. Classifying cable modem service as a cable service would easily harmonize with existing cable service regulation. For example, a cable operator would include cable modem service revenue in the calculation of its cable franchise fee, to the extent agreed upon by the operator and the local franchising authority. The privacy of cable modem subscribers would be protected pursuant to the provisions of Section 631 of the Communications Act, 47 U.S.C. § 551. Franchising authority regulation over cable modem service would be subject to the same limitations imposed by law with respect to the offering of other cable services. *See, e.g.*, 47 U.S.C. §§ 541(c) (no regulation of cable system as a common carrier or utility); 542 (limiting the imposition of franchise fees to local franchise authorities); 543 (limiting rate regulation by local franchise authorities); 544(a), (b), (f) (establishing scope of franchising authority regulation over cable services and facilities and the content of cable services).

[5/] Pub. L. No. 104-104, § 301(a)(1) (adding "or use," so that the definition reads "subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service").

[6/] H.R. Rep. 104-458 at 169 (1996) ("1996 Conference Report").

[7/] *Id.*

cable modem services from being subjected, *inter alia*, "to the traditional common carrier requirement of servicing all customers indifferently upon request."[8/]

While the definition of "cable service" refers to "one-way transmission to subscribers,"[9/] that does not exclude all interactive services from the definition of "cable service." To the contrary, the inclusion of the phrase "subscriber interaction" in the definition[10/] reflects Congress's recognition that cable services would include some upstream transmissions from subscribers. Interpreting "cable services" to exclude all interactivity would render Section 522(6)(B) inoperative, in violation of basic principles of statutory interpretation.[11/] As the legislative history makes clear, the term "one-way transmission" was meant only to exclude telephony-type services from the definition of a "cable service."[12/] And under the expanded definition of "cable service," cable modem service and other "interactive services" are considered cable services if they are provided by a cable operator over a cable system.[13/] A

8/ H.R. Rep. No. 98-934 at 60 (1984) ("1984 House Report"). The Ninth Circuit in the *Portland* case suggested that cable modem service is not a cable service because many requirements applicable to cable service -- such as leased access or must-carry -- would be inapplicable or unworkable if applied to Internet access. However, the Court confused the obligations of system operators with requirements imposed on cable networks. *AT&T v. City of Portland*, 216 F.3d 871, 876-77 (9th Cir. 2000). The requirements cited by the Court are imposed on cable systems and cable operators, not on specific cable services, and would be equally "unworkable" if applied to individual channels of video programming.

9/ 47 U.S.C. § 522(6)(A).

10/ *Id.* § 522(6)(B).

11/ *See Mountain States Tel. and Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) ("[s]tatutes should be interpreted so as not to render one part inoperative"); *Wenger v. Lumisys, Inc.*, 2 F. Supp. 2d 1231, 1242 (N.D. Cal. 1998) (noting that a statute should not be construed "in a way that leads to absurd or futile results at variance with policy or legislation as a whole").

12/ *See* 1984 House Report at 42 (service for voice communications is not a cable service). The 1984 House Report makes clear that non-voice services that involve an interactive component, including those in which the subscriber makes a request for information -- such as the ability to download computer software or video games -- are cable services. *See id.*

13/ 1996 Conference Report at 169. The *Notice* requests comment on whether the cable modem platform itself is a cable service. *Notice* ¶¶ 16-17. There is no "cable modem platform" distinct

Working Paper published by the FCC's Office of Plans and Policy also supports this reading of the statute.[14/]

B. Whether Or Not Cable Modem Service Is A Cable Service, It Is An Information Service -- And Not A Telecommunications Service.

Whether or not the Commission finds cable modem service to be within the definition of "cable service," there can be no question that cable modem service is an "information service."

An information service is defined by federal law as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[15/] Cable operators' cable modem service offers their subscribers precisely this capability to acquire or use information from the Internet via telecommunications. Indeed, the FCC already has determined that Internet access is an information service,[16/] because providers of Internet access "alter the format of information

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from the distribution facilities of a cable system. A "cable system" is "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community . . . ." 47 U.S.C. § 522(7). Cable operators use the same cable network used to deliver video programming to subscribers to create a closed path to deliver cable modem service. Thus, the cable modem platform fits comfortably within the definition of a cable system.

[14/] BARBARA ESBIN, FEDERAL COMMUNICATIONS COMMISSION, INTERNET OVER CABLE: DEFINING THE FUTURE IN TERMS OF THE PAST, OPP Working Paper No. 30, at 88 (August 1998) ("The Commission could reasonably conclude that Internet access services . . . , when provided by a cable operator over its cable system, come within the revised definition of 'cable services' under Title VI.").

[15/] 47 U.S.C. § 153(20).

[16/] *See Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11536 ¶ 73 (1998) ("*Universal Service Report to Congress*") ("Internet access services are appropriately classified as information, rather than telecommunications, services. Internet access providers do not offer a pure transmission path; they combine computer processing, information provision, and other computer-mediated offerings with data transport"). The Commission noted in the *Universal Service Report to Congress* that it had "not yet established the regulatory classification of Internet services provided over cable television facilities." *See id.* at 11535 ¶ 69 n.140. This had no bearing on the Commission's determination that Internet access services are information

through computer processing applications such as protocol conversion and interaction with stored data."[17/]

Although cable modem service is provided via telecommunications, that does not render it a telecommunications service. There is a clear distinction between providing a service "via telecommunications" -- an inherent aspect of an information service -- and providing a telecommunications service. A service is provided "via telecommunications" if information "of the user's choosing between points that the user specifies" is transmitted to customers by wire or radio.[18/] In contrast, providing a telecommunications *service* involves offering telecommunications (the transmission without alteration of any information selected by the user)[19/] to the public, for a fee. While information service providers interact with subscribers by making certain content available and facilitating its use, telecommunications service providers provide pure transmission facilities and services, with no accompanying content, which customers use to carry information of their choosing.

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services, however, and the question reserved in the *Universal Service Report to Congress* is the one presented squarely in the instant proceeding. Furthermore, the 11th Circuit has expressly acknowledged that the Commission has "defined the Internet as an information service," and that it is clear that "there is no statutory basis for the FCC to regulate the Internet as a telecommunications service under the 1996 Act." *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1277 (11th Cir. 2000).

[17/] *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9180 ¶ 789 (1997) ("*Universal Service Order*") (noting that "the statutory definition of telecommunications only includes transmissions that do not alter the form or content of the information sent"); *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777, 6794-95 ¶ 33 (1998) ("The Universal Service Order concluded that Internet service is not the provision of a telecommunications service under the 1996 Act. Under this precedent, a cable television system providing Internet service over a commingled facility is not a telecommunications carrier subject to the revised rate mandated by Section 224(e) by virtue of providing Internet service") (internal citations omitted).

[18/] 47 U.S.C. § 153(43).

[19/] *See id.* §§ 153(43) & (46).

The Commission has long recognized that when information service providers obtain telecommunications and use it to provide information services, telecommunications is merely a component of, or input to, information services, and that such information service providers are not "offering" telecommunications services.[20/] Put another way, "telecommunications service" and "information service" are mutually exclusive categories.[21/] Indeed the Commission has determined that information service providers are not required to contribute to the universal service fund because they are not "telecommunications carriers."[22/]

Nor does the fact that information service providers use their own telecommunications facilities to provide their service mean that they are engaged in the provision of a telecommunications service. The Ninth Circuit's suggestion in the *Portland* case that cable modem service comprises two separate services offered to end users -- a telecommunications service (transport over cable broadband facilities) and an information service (conventional Internet access) -- is erroneous.[23/] The Ninth Circuit's opinion rested on the erroneous premise

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[20/] *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384, 428-435 ¶¶ 114-132 (1980) ("*Computer II*").

[21/] *See generally Universal Service Report to Congress*, 13 FCC Rcd at 11516-26 ¶¶ 33-48.

[22/] *See Universal Service Order*, 12 FCC Rcd at 9179-81 ¶¶ 788-790.

[23/] *See Portland* at 877-79. In any event, the Ninth Circuit's discussion of this point was not a necessary element of its decision to invalidate Portland's ordinance. The court found the Portland ordinance unlawful because cable modem service is not a "cable service" subject to the regulatory oversight of local franchising authorities. As the Commission has observed, the court's determination that there is a separate transmission component of cable modem service that is a "telecommunications service" under the Act was an "unnecessary extra step." Amicus Curiae Brief of the Federal Communications Commission in *Henrico* at 20-22 ("FCC Amicus Brief"). *Cf. Notice* at ¶ 13 n.26 (noting that the court reached its conclusion "without specifically construing the language of the statututory definitions at issue). Thus the court's holding on this point is dictum, and it does not bind the Commission. *See United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988) (dictum is "a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding"). Indeed, the court itself stated that "Congress has reposed the details of telecommunications policy in the FCC," and it would not "impinge" on the Commission's authority in this area. *Portland*, 216 F.3d at 879-80.

that services provided over "telecommunications facilities" are "telecommunications services," and that because cable operators use telecommunications facilities to deliver cable modem service, cable modem service is a telecommunications service. However, as Commission counsel has recognized, "not every use of telecommunications facilities necessarily involves the provision of a 'telecommunications service' under the Act's specialized definition of that term."[24/] This is because "telecommunications" and "telecommunications service" are not interchangeable terms. As discussed above, federal law defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[25/] "Telecommunications service," on the other hand, has a more limited definition, meaning only "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[26/]

Cable operators offering cable modem service are not telecommunications service providers. They do not sell transport stripped of content to anyone.[27/] Rather, they offer a cable, or at most, an information, service to subscribers, an integral part of which is its content and applications (*e.g.*, local news, information, and advertising, and chat rooms). As the district court in *Broward County* recently recognized, cable modem service is "a single integrated *programming*

[24/] FCC Amicus Brief at 21.

[25/] 47 U.S.C. § 153(43).

[26/] *Id.* § 153(46).

[27/] Where cable operators provide a telecommunications service, they are subject to regulation as a telecommunications service provider. *See, e.g., Universal Service Order*, 12 FCC Rcd at 9176 ¶ 781 (stating that "video service providers must contribute to universal service only to the extent that they are providing interstate telecommunications services").

option."[28] As discussed above, the fact that cable operators provide cable modem service via telecommunications facilities does not render it a telecommunications service. Rather, the wires used by the cable modem service are merely the means of delivering content and Internet connectivity to cable subscribers, not any severable aspect of the service.[29]

Further evidence that cable modem service is not a telecommunications service and cable operators are not telecommunications service providers is that it would be extremely difficult to apply obligations imposed on telecommunications carriers -- for example, the general duty to serve all comers indifferently -- to providers of cable modem service.[30] If the Commission were

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[28] *Comcast Cablevision of Broward County, Inc. et al. v. Broward County, Florida*, No. 99-6934-Civ.-Middlebrooks, Order Granting Plaintiffs' Cross-Motions for Summary Judgment and Denying Defendant's Motion for Summary Judgment (S.D. Fla. Nov. 8, 2000) ("*Broward County*") slip op. at 9 (emphasis added).

[29] *See id.* at 9, 12 (rejecting idea that cable operators possess a "unique facility" that merits separation of the "transmission mechanism").

[30] USTA recently filed a Petition for Declaratory Ruling, asserting that cable operators that provide cable modem service are subject to universal service obligations. *Universal Service Contribution Obligations Of Cable Operators That Provide Telecommunications Services*, CC Docket 00-185, *Petition for Declaratory Ruling* (Sep. 26, 2000). This Petition is fundamentally flawed in several respects. First, it is based on the faulty premise that cable modem service is a telecommunications service and that cable operators providing cable modem service are telecommunications carriers (*id.* at 4-7) -- the very questions at issue in this proceeding. Once the Commission finds that cable modem service is not a telecommunications service, as demonstrated above, the foundations of USTA's specious petition collapse.

Second, USTA's assertion that cable operators do not contribute to universal service (*id.* at 7) is inaccurate. When cable operators provide Title II services, they are subject to the universal service contribution requirements of Section 254(d). Cable operators that provide telecommunications services currently contribute to the federal and applicable state universal service funds. There is only one situation in which cable operators providing cable modem service may be liable for universal service contributions attributable to those services, and that is if the Commission determines cable operators along with any other ISPs operating their own telecommunications networks are non-common carrier "provider[s] of interstate telecommunications services" that can be required to contribute pursuant to Section 254(d). 47 U.S.C. § 254(d). Thus far, however, the Commission has declined to make such a determination. *Universal Service Report to Congress*, 13 FCC Rcd at 11564-70 ¶¶ 131-139. Such a determination would have to be applied to all "self-providing" ISPs and not just cable operators. *See Melody Music v. FCC*, 345 F.2d 730, 732 (D.C. Cir. 1965).

to attempt to classify cable modem service as telecommunications service, it would have to undertake numerous lengthy and complicated proceedings to determine how existing common carrier rules could be altered to harmonize with its decision. Indeed, the Commission itself in the *Henrico* case noted the "significant regulatory consequences" that arise out of a determination that there is a "transmission component" of cable modem service that is a "telecommunications service."[31/]

In contrast, as discussed above, classifying cable modem service as a cable service would require minimal modifications to existing rules.[32/] The harmonious manner in which cable modem service would fit into the existing statutory and regulatory regime confirms that that interpretation is the correct one.[33/]

C. Even If Cable Operators Provided A Separate Transport Function To Unaffiliated ISPs, That Service Would Not Be A Telecommunications Service.

As described below, some cable operators are or will shortly begin testing ways to offer their subscribers a choice of ISPs with the aim of providing these options on a commercial basis -- consistent with the public policy goals encouraged by the Commission. The use of the cable system to provide these ISPs' services does not entail the provision of a telecommunications service to the ISPs. The characteristics of such arrangements with ISPs -- long term contracts, individually negotiated terms and conditions rather than an indifferent "holding out" to the

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[31/] FCC Amicus Brief at 21.

[32/] *See* n.4, *supra.*

[33/] *See, e.g., Commissioner of Internal Revenue v. Bilder*, 289 F.2d 291, 299 (3d Cir. 1961), *rev'd on other grounds*, 369 U.S. 499 (1962) (in interpreting a statute the reviewing body must look to the provisions of the whole law, including its object and policy, and any construction that "would produce incongruous results" should be avoided); *National Labor Relations Board v. Greensboro Coca Cola Bottling Co.*, 180 F.2d 840, 845 (4th Cir. 1950) (statutes should not be construed so as to make them administratively unworkable if another construction is possible).

public -- would clearly identify them as, at most, private carriage. This would be the case even if a cable operator were to provide a separate transport function to unaffiliated ISPs. And if such a transport function were also to include additional functionalities such as caching and navigation, it would fall within the definition of an information service. In either case, common carrier regulation of access would be neither lawful nor appropriate.

1. Even If Cable Operators Were To Provide Transport Service To ISPs, It Would Constitute Private Carriage.

Telecommunications services, by definition, are services offered on a common carrier basis.[34/] When cable operators contract with ISPs to offer their services to subscribers, this is not generally tantamount to the provision of transport service to such ISPs. But even if a cable operator were simply to provide transport service to unaffiliated ISPs, it would constitute private carriage, not common carriage, under the long-standing test established by the D.C. Circuit in *NARUC I*[35/] and codified by the 1996 Telecommunications Act.[36/] Under the *NARUC I* test, there are two prongs in determining whether an entity is a private or common carrier: first, whether there is a legal compulsion to serve the public indifferently; and second, whether there are reasons implicit in the entity's operations to expect that it should hold itself out to the public indifferently.[37/] Cable operators providing transport services to ISPs would not be common carriers under either prong of the test.

[34/] *See* 47 U.S.C. § 153(44) (telecommunications carrier is a common carrier "only to the extent that it is engaged in the provision of telecommunications services"); *see also Universal Service Order*, 12 FCC Rcd at 9177-78 ¶ 785 (determining that "telecommunications services" means "only telecommunications provided on a common carrier basis").

[35/] *NARUC v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*").

[36/] *Virgin Islands Tel. Co. v. FCC*, 198 F.3d 921, 924-27 (D.C. Cir. 1999) ("it is reasonable to read the [1996 Act] as adopting the NARUC I framework").

[37/] *NARUC I*, 525 F.2d at 641-42.

In applying the first prong, the Commission focuses on whether the entity provides service to all that approach (the scope of users for whom the service is intended), and whether the entity provides service on the same terms and conditions in each instance. Cable operators will not serve all ISPs in the exact same manner – for good reason, as discussed below in Section III. Rather, cable operators plan to contract with certain unaffiliated ISPs to provide cable modem service under private, individually negotiated agreements.[38/] The terms and conditions of these agreements, such as pricing, speed, and system usage, depend both on technical aspects of the cable system and the services that cable operators and ISPs plan to provide over the system. These agreements will not be standardized, but will necessarily vary from one ISP to the next. Under these circumstances, the first prong of *NARUC I* is not met.[39/]

The Commission has interpreted the second prong of the *NARUC I* test to mean that a carrier will be regulated as a common carrier if "the public interest requires common carrier operation of the proposed facility," either because the carrier possesses market power or because "alternate common carrier facilities" are not available.[40/] The Commission already has concluded on several occasions that cable operators do not possess market power in the delivery

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[38/] *See, e.g.*, Memorandum of Understanding Between Time Warner, Inc. and America Online, Inc. Regarding Open Access Business Practices (Feb. 29, 2000) ("AOL/TW MOU") (noting that the combined AOL Time Warner plan to "negotiat[e] arm's-length commercial agreements with both affiliated (such as AOL) and unaffiliated ISPs that wish to offer service on the AOL Time Warner broadband cable systems"); Letter from David N. Baker, Vice President Legal & Regulatory Affairs, Mindspring Enterprises, Inc., et al., to William E. Kennard, Chairman, Federal Communications Commission (Dec. 6, 1999) ("Mindspring Letter") (stating that "AT&T is prepared to negotiate private commercial arrangements with multiple ISPs").

[39/] *See Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (determining that Southwestern Bell was offering private carriage because it "cho[se] its clients on an individual basis;" determined on what terms to serve each of those clients; negotiated individual contracts with these clients on a case-by-case basis; and was under "no specific regulatory compulsion to serve all indifferently").

of Internet access service. To the contrary, in the *First 706 Report*, the FCC found that "[t]he preconditions for monopoly appear absent."[41/] As the Commission explained, there are "a large number of actual participants and potential entrants in this market" with no single competitor able to dominate the "last mile" to the home.[42/] In its most recent 706 report, the Commission confirmed this conclusion, further suggesting that DSL service will likely increase and perhaps exceed cable modem service subscriber numbers.[43/] Further, the Commission's *High-Speed Services Report* [44/] has documented the extensive availability of alternate broadband facilities.

The fact that a particular service may be functionally similar to a service typically categorized as common carriage or that two carriers "are indistinguishable in terms of the clientele actually served," is not determinative of whether one is a private or common carrier.[45/] In fact, the Commission has found that even where a provider intends to sell its network capacity to common carriers so that the common carriers can provide telecommunications services over

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[40/] *Cable & Wireless, PLC Application for a License to Land and Operate in the United States a Private Submarine Fiber Optic Cable Extending Between the United States and the United Kingdom*, 12 FCC Rcd 8516, 8522 ¶¶ 14-15 (1997).

[41/] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd 2398, 2423 ¶ 48 (1999) ("*First 706 Report*").

[42/] *Id.*

[43/] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, *Second Report*, FCC 00-290, ¶¶ 94, 195-96, 204 (rel. Aug. 21, 2000) ("*Second 706 Report*").

[44/] COMMON CARRIER BUREAU, FEDERAL COMMUNICATIONS COMMISSION, HIGH-SPEED SERVICES FOR INTERNET ACCESS: SUBSCRIBERSHIP AS OF JUNE 30, 2000 (October 2000) ("HIGH-SPEED SERVICES REPORT").

[45/] *NARUC I*, 525 F.2d at 642.

the network, the provider may still be offering private carriage.[46/] Even if an entity serves as a common carrier in one capacity, that does not preclude that provider from offering private carriage in other circumstances.[47/]

2. The Provision Of Transport Capabilities May Be An Information Service In Some Circumstances.

If cable operators were to provide transport service to ISPs along with additional functions, the service might constitute not private carriage, but an information service. As discussed above, an information service is the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[48/] Certain services that may be offered to ISPs by cable operators would fall within this definition.

For instance, in order to serve unaffiliated ISPs effectively, cable operators may need to develop multiple interfaces for each ISP to enable customer provisioning, monitoring, and billing systems.[49/] Each ISP will have different needs with respect to its customer base and connection speeds.[50/] Cable operators might choose to enter into arrangements with ISPs to cache specified

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[46/] *See Virgin Island Tel.*, 198 F.3d at 929-30 (upholding a determination by the Commission that an operator of a submarine cable system that made its network available to certain common carriers was offering private, not common, carriage).

[47/] *See* n.35, *supra; see also NARUC v. FCC* 533 F.2d 601, 608 (D.C. Cir. 1976) ("*NARUC II*") ("it is at least logical to conclude that one can be a common carrier with regard to some activities but not others"); *Southwestern Bell Tel.*, 19 F.3d at 1481 (determining that the filing of a tariff was not dispositive of whether a service was a common carrier offering).

[48/] 47 U.S.C. § 153(20).

[49/] *See* AT&T Corp., *Eight ISPs Join AT&T Broadband Choice Trial, at* http://www.att.com/press/item/0,1354,3435,00.html (Nov. 1, 2000) ("*AT&T Boulder Trial*") (during a trial in Boulder, Colorado, unaffiliated ISPs "will share customer care processes, connect to the AT&T Broadband network and develop interfaces with AT&T to provide customer service").

[50/] *See, e.g.*, AOL/TW MOU ¶ 5 ("economic arrangements reached by AOL Time Warner and ISPs wishing to provide broadband service will vary depending on a number of factors (such as the speed, marketing commitment, and nature and tier of the service desired to be offered)").

content, provide advertising or other content for the ISP, or perform other services.[51/] "Making available information" or "offering a capability" for storing, acquiring or using information in this way would constitute an information service.[52/]

D. Under Any Regulatory Classification, Federal Law Prohibits Forced Access Requirements.

1. If Cable Modem Service Is A Cable Service, Forced Access Requirements Are Prohibited By The Communications Act.

a. Section 621(c) of the Act bars common carrier or utility regulation of cable services.

Section 621(c) of the Communications Act, 47 U.S.C. § 531(c), states: "Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service." As discussed above, the Act defines cable services to include cable modem services. The only question then is whether forced access requirements subject cable systems to common carrier and utility regulation. As demonstrated below, forced access is the paradigm of a common carrier obligation.

An entity is considered a common carrier if it is required to hold itself out indifferently even to a *segment* of the public.[53/] The Supreme Court has held that requirements that cable operators provide access to "broad categories of users" by holding out dedicated channels on a

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[51/] *See, e.g.*, Mindspring Letter at 2 (agreements between the parties will address issues such as "pricing, billing, customer relationship, design of start page, degree of customization, speed, system usage, caching services, co-branding ancillary services, advertising and e-commerce revenues, and infrastructure costs").

[52/] 47 U.S.C. § 153(20). As discussed below, information services are not subject to Title II unbundling obligations.

[53/] *See NARUC I*, 525 F.2d at 641; *Terminal Taxicab v. Kurtz*, 241 U.S. 252 (1916) (finding that a firm is a common carrier if it is required indiscriminately to provide service to a subset of the public). Congress has likewise provided expressly that the offering of telecommunications to "such classes of users as to be effectively available directly to the public" is a common carrier service. 47 U.S.C. §§ 153(46), (44).

first-come, first-served nondiscriminatory basis "plainly impose common-carrier obligations on cable operators."[54/] The legislative history of Section 621(c) makes clear that Congress intended to preclude the imposition on a cable operators of "the traditional common carrier requirement of servicing all customers indifferently upon request . . .."[55/] The Senate version of the bill that ultimately became the 1996 Act specifically was amended to make clear that cable operators are not engaged in the provision of "telecommunications service" to the extent they provide cable services.[56/]

Congress has resolved arguments for different access requirements by establishing several very limited exceptions to this general rule, to address very specific problems it has identified. The result is that the Cable Act generally preserves cable operator control over the programming carried on its system, except in three limited areas: access to channels for "public, educational, and governmental" use;[57/] access to a statutorily limited number of channels for

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[54/] *FCC v. Midwest Video Corp.*, 440 U.S. 689, 699-702 (1971).

[55/] 1984 House Report at 60. Section 651(b) of the Communications Act, 47 U.S.C. § 571(b), sheds additional light on the intent behind the prohibition on "common carrier" regulation in Section 621(c). Section 651(b) was added to Title VI in 1996 to establish the regulatory scheme for the provision of video programming by telephone companies. Section 651 states that, to the extent a telephone company provides video programming to subscribers, it "shall not be required, pursuant to Title II of this Act, to make capacity available on a nondiscriminatory basis to any other person for the provision of cable service directly to subscribers." *Id.* Section 651(b) was intended to ensure that telephone companies offering video services were on a level playing field with cable operators. Its prohibition on common carrier-like "nondiscriminatory access" requirements reinforces and explains the ban on "common carrier regulation" in Section 621(c).

[56/] *See Universal Service Report to Congress*, 13 FCC Rcd at 11523 ¶ 44 (explaining that the reference to cable service was deleted from the Senate definition of "telecommunications services" so courts would not interpret the term "too broadly and inappropriately classify cable systems . . . as telecommunications carriers."). As Senator Pressler, Chairman of the Senate Commerce Committee at the time, explained, the change was "intended to clarify that carriers of broadcast or cable services are not intended to be classed as common carriers under the Communications Act to the extent that they provide broadcast or cable services." 141 Cong. Rec. S7996 (June 8, 1995) (statement of Sen. Pressler). This change was carried forward to the enacted statute.

[57/] 47 U.S.C. § 531.

commercial use (so-called "leased access" channels);[58/] and the reservation of channels for the carriage of over-the-air broadcast signals.[59/]

Over the last thirty years, the FCC and the Courts have rejected efforts to expand access to cable systems, in the absence of specific Congressional authorization.[60/] The FCC recently affirmed the limitation Congress placed on access requirements. In the *AT&T/TCI Merger Order*, in rejecting calls for the imposition of forced access requirements, the Commission stated that it "continue[s] to recognize and adhere to the distinctions Congress drew between cable and common carrier regulation."[61/]

Further, Congress prohibited not only imposing common carrier regulation on cable systems, but also subjecting cable systems to utility regulation. In so doing, Congress clearly intended to prevent not only regulation that converted cable operators into common carriers, but also other regulatory actions that treated cable operators *like* common carriers or utilities. Treating a cable system as an "essential facility"[62/] by imposing access regulations on it is the

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[58/] *See id.* § 532.

[59/] *See id.* § 534. Other "access" obligations imposed on cable operators are also the result of specific statutory enactments narrowly tailored to address specific government interests that were identified through the legislative process. *See, e.g., id.* §§ 624(i) (access to in-home cable wiring); 628 (access to satellite cable programming).

[60/] The FCC and the Courts have based their decisions on Congress' effort throughout the Communications Act to preserve the First Amendment editorial discretion of cable operators, and impose only those discrete intrusions upon that discretion that it deemed absolutely necessary. *See Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (citing *Leathers v. Medlock*, 499 U.S. 439, 444 (1991)); *National Cable Tel. Ass'n v. FCC*, 33 F.3d 66, 75 (D.C. Cir. 1994) (comparing providers of video dialtone, a common carriage service, to cable operators, who "exercise a significant amount of editorial discretion regarding what their programming will include").

[61/] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee*, 14 FCC Rcd 3160, 3176 ¶ 29 (1999) ("*AT&T/TCI Merger Order*").

[62/] Utility regulation is premised on the notion that the denied facility is "essential" in the sense that lack of access to it would eliminate all rivals in the downstream market. *See Alaska Airlines*

essence of common carrier-like utility regulation.

b. Title II of the Communications Act confirms that cable operators should not be subject to forced access requirements.

After careful deliberation, Congress structured the Communications Act to limit the obligation to provide interconnection "at any technically feasible point" and "unbundled network elements" to incumbent local exchange carriers ("ILECs").[63/] These requirements were imposed on *ILECs* in order to break open their monopolies over the provision of two-way local services.[64/] Significantly, Congress did *not* extend unbundling requirements to any other common carriers, including competitive local exchange carriers, let alone to cable operators, which are not telecommunications carriers at all. To the contrary, Congress carefully distinguished among carriers based on their market power.[65/] Legislators reasoned that the imposition of the incumbent LECs' obligations on competitive LECs would be inconsistent with the pro-competitive purposes of the Communications Act,[66/] and unnecessary, given the latter's lack of

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v. United Airlines, 948 F.2d 536, 544 (9th Cir.1991) ("A facility that is controlled by a single firm will be considered 'essential' only if control of the facility carries with it the power to eliminate competition in the downstream market."); *Twin Labs. v. Weider Health & Fitness*, 900 F.2d 566, 569 (2d Cir.1990) ("As the word 'essential' indicates, a plaintiff must show more than inconvenience, or even some economic loss; he must show that an alternative to the facility is not feasible."); *McKenzie v. Mercy Hosp.*, 854 F.2d 365, 370-71 (10th Cir.1988) (no claim if, after being denied essential facility, plaintiff is still able to compete). As demonstrated in Section II, *infra*, and in the Commission's various reports on broadband deployment, cable is not an "essential facility."

63/ 47 U.S.C. §§ 251(c)(2), (3).

64/ At the time of enactment, ILECs controlled 99% of the local telephone market. The total number of cable modem service customers currently represents less than 2% of Internet subscribers in the United States.

65/ *Compare* 47 U.S.C. § 251(a) (obligations imposed on telecommunications carriers) *with* 47 U.S.C. § 251(b) (obligations imposed on all local exchange carriers) and § 251(c) (obligations imposed solely on incumbent local exchange carriers).

66/ *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service*